

§ 488.432

exceed 12 months, if CMS finds that immediate payment would create substantial and undue financial hardship on the facility.

(4) If the full civil money penalty is not placed in an escrow account within 30 calendar days from the date the provider receives notice of collection, or within 30 calendar days of any due date established pursuant to a hardship finding under paragraph (b)(3), CMS may deduct the amount of the civil money penalty from any sum then or later owed by CMS or the State to the facility in accordance with § 488.442(c).

(5) For any civil money penalties that are not collected and placed into an escrow account under this section, CMS will collect such civil money penalties in the same manner as the State in accordance with § 488.432.

(c) *Maintenance of escrowed funds.* CMS will maintain collected civil money penalties in an escrow account pending the resolution of any administrative appeal of the deficiency findings that comprise the basis for the civil monetary penalty imposition. CMS will retain the escrowed funds on an on-going basis and, upon a final administrative decision, will either return applicable funds in accordance with paragraph (d)(2) of this section or, in the case of an unsuccessful administrative appeal, will periodically disburse the funds to States or other entities in accordance with § 488.433.

(d) *When a facility requests a hearing.*

(1) A facility must request a hearing on the determination of the noncompliance that is the basis for imposition of the civil money penalty as specified in § 498.40 of this chapter.

(2) If the administrative law judge reverses deficiency findings that comprise the basis of a civil money penalty in whole or in part, the escrowed amounts continue to be held pending expiration of the time for CMS to appeal the decision or, where CMS does appeal, a Departmental Appeals Board decision affirming the reversal of the pertinent deficiency findings. Any collected civil money penalty amount owed to the facility based on a final administrative decision will be returned to the facility with applicable interest

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as specified in section 1878(f)(2) of the Act.

[76 FR 15126, Mar. 18, 2011]

§ 488.432 Civil money penalties imposed by the State: NF-only.

(a) *When a facility requests a hearing.*

(1) When the State imposes a civil money penalty against a non-State operated NF that is not subject to imposition of remedies by CMS, the facility must request a hearing on the determination of noncompliance that is the basis for imposition of the civil money penalty within the time specified in § 431.153 of this chapter.

(2)(i) If a facility requests a hearing within the time frame specified in paragraph (a)(1) of this section, for a civil money penalty imposed per day, the State initiates collection of the penalty when there is a final administrative decision that upholds the State's determination of noncompliance after the facility achieves substantial compliance or is terminated.

(ii) If a facility requests a hearing for a civil money penalty imposed per instance of noncompliance within the time specified in paragraph (a)(1) of this section, the State initiates collection of the penalty when there is a final administrative decision that upholds the State's determination of noncompliance.

(b) When a facility does not request a hearing for a civil money penalty imposed per day. (1) If a facility does not request a hearing in accordance with paragraph (a) of this section, the State initiates collection of the penalty when the facility—

(i) Achieves substantial compliance; or

(ii) Is terminated.

(2) *When a facility does not request a hearing for a civil money penalty imposed per instance of noncompliance.* If a facility does not request a hearing in accordance with paragraph (a) of this section, the State initiates collection of the penalty when the time frame for requesting a hearing expires.

(c) When a facility waives a hearing.

(1) If a facility waives, in writing, its right to a hearing as specified in

§ 488.436, for a civil money penalty imposed per day, the State initiates collection of the penalty when the facility—

(i) Achieves substantial compliance; or (ii) Is terminated.

(2) If a facility waives, in writing, its right to a hearing as specified in § 488.436, the State initiates collection of civil money penalty imposed per instance of noncompliance upon receipt of the facility's notification.

(d) Accrual and computation of penalties for a facility that—

(1) Requests a hearing or does not request a hearing are specified in § 488.440;

(2) Waives its right to a hearing in writing, are specified in §§ 488.436(b) and 488.440.

[59 FR 56243, Nov. 10, 1994; 60 FR 50119, Sept. 28, 1995, as amended at 64 FR 13360, Mar. 18, 1999; 76 FR 15127, Mar. 18, 2011]

§ 488.433 Civil money penalties: Uses and approval of civil money penalties imposed by CMS.

Ten percent of the collected civil money penalty funds that are required to be held in escrow pursuant to § 488.431 and that remain after a final administrative decision will be deposited with the Department of the Treasury in accordance with § 488.442(f). The remaining ninety percent of the collected civil money penalty funds that are required to be held in escrow and that remain after a final administrative decision may not be used for survey and certification operations but must be used entirely for activities that protect or improve the quality of care for residents. These activities must be approved by CMS and may include, but are not limited to:

(a) Support and protection of residents of a facility that closes (voluntarily or involuntarily).

(b) Time-limited expenses incurred in the process of relocating residents to home and community-based settings or another facility when a facility is closed (voluntarily or involuntarily) or downsized pursuant to an agreement with the State Medicaid agency.

(c) Projects that support resident and family councils and other consumer involvement in assuring quality care in facilities.

(d) Facility improvement initiatives approved by CMS, such as joint training of facility staff and surveyors or technical assistance for facilities implementing quality assurance and performance improvement program, when such facilities have been cited by CMS for deficiencies in the applicable requirements.

(e) Development and maintenance of temporary management or receivership capability such as but not limited to, recruitment, training, retention or other system infrastructure expenses. However, as specified in § 488.415(c), a temporary manager's salary must be paid by the facility.

[76 FR 15127, Mar. 18, 2011]

§ 488.434 Civil money penalties: Notice of penalty.

(a) *CMS notice of penalty.* (1) CMS sends a written notice of the penalty to the facility for all facilities except non-State operated NFs when the State is imposing the penalty.

(2) *Content of notice.* The notice that CMS sends includes—

(i) The nature of the noncompliance;

(ii) The statutory basis for the penalty;

(iii) The amount of penalty per day of noncompliance or the amount of the penalty per instance of noncompliance;

(iv) Any factors specified in § 488.438(f) that were considered when determining the amount of the penalty;

(v) The date of the instance of noncompliance or the date on which the penalty begins to accrue;

(vi) When the penalty stops accruing, if applicable;

(vii) When the penalty is collected; and

(viii) Instructions for responding to the notice, including a statement of the facility's right to a hearing, and the implication of waiving a hearing, as provided in § 488.436.

(b) *State notice of penalty.* (1) The State must notify the facility in accordance with State procedures for all non-State operated NFs when the State takes the action.

(2) The State's notice must—

(i) Be in writing; and